COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2149

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN E. BRAXTON A/K/A SHAWN CONLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] This is an appeal from an order denying Shawn Braxton's motion for postconviction relief, pursuant to WIS. STAT. § 973.13 (1999-2000). Braxton asserts that he is entitled to an order voiding the part of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

each of three sentences that exceeded the normal maximum penalty for those sentences. He agrees that the statutory maximum for his sentences was enhanced pursuant to WIS. STAT. § 939.62 (1995-96).[2] He asserts, however, that he did not agree to the date of a prior conviction which triggered the enhancements and that the State did not provide a certified copy of that conviction. Therefore, the State did not follow the mandate of WIS. STAT. § 973.12.[3] We conclude that ***State v. Liebnitz***, 231 Wis. 2d 272, 603 N.W.2d 208 (1999), controls. We affirm.

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[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted. WISCONSIN STAT. § 939.62 provides in relevant part:

> (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> ….
>
> (2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

[3] WISCONSIN STAT. § 973.12(1) provides in relevant part:

> Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before

(continued)

¶2 Braxton's motion for postconviction relief asserts that he was sentenced on September 5, 1996, to nine years in prison as a result of being convicted of three misdemeanors, enhanced by his previous conviction for felony escape. He attached a copy of his judgment of conviction for that felony to his motion. The judgment is dated January 26, 1995, and provides: "It is adjudged that the defendant is convicted on 10-19-94 as found guilty and is sentenced as follows." Braxton further asserts, and the record shows, that the criminal complaint in this case alleged that Braxton was subject to an additional penalty for habitual criminality because he was convicted of felony escape on January 17, 1995. He concludes that because the State alleged the improper conviction date for the previous felony, the penalty enhancer was not proven.

¶3 Braxton also contends that he did not agree that he had a prior felony conviction and that since the State did not file a certified copy of his previous felony escape conviction in the record in this case, the requirements of WIS. STAT. § 973.12 were not met. For all these reasons, he argues that the enhanced portion of his sentence must be voided.

¶4 Braxton cites ***State v. Farr***, 119 Wis. 2d 651, 350 N.W.2d 640 (1984), ***Cresci v. State***, 89 Wis. 2d 495, 278 N.W.2d 850 (1979), ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), and ***State v. Goldstein***, 182 Wis. 2d 251, 513 N.W.2d 631 (Ct. App. 1994), to support his argument that a criminal complaint must allege an exact conviction date to support an increased penalty for habitual criminality, whereas the complaint on which his guilty plea

> accepting a plea. If the prior convictions are admitted by the defendant or proved by the state, he or she shall be subject to sentence under s. 939.62 unless he or she establishes that he or she was pardoned on grounds of innocence for any crime necessary to constitute him or her a repeater or a persistent repeater.

was based did not. While we do not agree that the four cases upon which Braxton relies hold as he suggests, those cases are inapplicable. We are bound by opinions of the supreme court. ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984). And where opinions of the supreme court arguably conflict, we follow that court's rule and follow its most recent opinion. ***Spacesaver Corp. v. DOR***, 140 Wis. 2d 498, 502, 410 N.W.2d 646 (Ct. App. 1987). The most recent supreme court case construing WIS. STAT. § 973.12, ***State v. Liebnitz***, 231 Wis. 2d 272, 603 N.W.2d 208 (1999), therefore controls. In ***Liebnitz***, the trial court failed to ask the defendant, Liebnitz, if he was a repeat offender. ***Liebnitz***, 231 Wis. 2d at 282. The supreme court did not hold that the record must include a certified copy of a defendant's prior judgment of conviction and it affirmed Liebnitz's enhanced penalty. The court held:

> Liebnitz pled no contest, which is an admission to all the material facts alleged in the complaint. The complaint, read in whole to Liebnitz, contained the repeater allegations. He responded affirmatively that he understood these allegations and, at the taking of the plea, stated he would not contest them. We conclude therefore that based upon the totality of the record, Liebnitz's plea to the information constituted an admission for purposes of Wis. Stat. § 973.12.

Liebnitz, 231 Wis. 2d at 287-88.

¶5 ***Liebnitz*** has introduced a common sense analysis to cases alleging improper plea taking where a penalty enhancer is involved. We will follow the ***Liebnitz*** analysis here. While we agree with Braxton that the complaint in this case incorrectly identified his prior date of conviction as January 17, 1995, the date on which he was sentenced, instead of October 19, 1994, the date on which he was convicted, that mistake does not void the penalty enhancement under WIS.

STAT. § 939.62.[4] It does not matter whether Braxton's conviction was January 17, 1995, or October 19, 1994. Either date is well within five years of the date of the crimes for which Braxton was convicted in this case. Comparing this case to ***Liebnitz***, we see that Braxton pleaded no contest to three misdemeanors, which is an admission to all the material facts supporting the three misdemeanors alleged in the complaint. ***Liebnitz***, 231 Wis. 2d at 287-88. The complaint was not read in whole to Braxton. Nonetheless, the court asked Braxton:

> THE COURT: And, Mr. Braxton, do you understand that you are being charged as a habitual criminal by virtue of a conviction which occurred on January 17th, 1995, in which you were convicted of felony escape? Do you understand that, sir?

Braxton answered "Yes." And later, the following colloquy took place:

> THE COURT: Mr. Braxton, you've heard the statement of your counsel, and given the concession by the prosecution, the habitual criminality matters with respect to both counts 2 and 3 are a three year maximum….
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> [DEFENSE COUNSEL]: Yes, and 4 will be the same, your Honor.
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> THE COURT: Yes, I understand that, but you understand that, Mr. Braxton?
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> MR. BRAXTON: Yes.
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> THE COURT: Very well. And to the charge—And, sir, were you convicted of a felony within the last five years?
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> MR. BRAXTON: Yes.
>
> THE COURT: And that was felony escape in Case No. 94CF1322B?
>
> MR. BRAXTON: Yeah, Yes.

[4] We are not convinced by the State's argument, based on ***State v. Wimmer***, 152 Wis. 2d 654, 449 N.W.2d 621 (Ct. App. 1989), that the date of sentencing is really the date of conviction. The only way that would be true is when conviction and sentencing occur on the same day.

> THE COURT: And did that conviction occur on January 17th, 1995 at the Rock County Circuit Court, Beloit, Wisconsin?
>
> MR. BRAXTON: Yeah, as far as I remember.

¶6 We are unimpressed with Braxton's argument that considering only his last answer, "Yeah, as far as I can remember," the record is unclear as to the date of his felony escape conviction. In this case, the mistake as to that date is not relevant. The trial court, the district attorney, Braxton, and his counsel knew beyond any doubt that Braxton was subject to WIS. STAT. § 939.62, and that he was a repeater because he had been convicted of a felony within five years of committing the three misdemeanors for which he was charged in this case. Braxton admitted that when he answered "yes" to the question, "And, sir, were you convicted of a felony within the last five years?" What Braxton is really relying on is the dissent in ***Liebnitz***. While he may empathize with that dissent, it does not help him. A dissent is what the law is not.

¶7 From the record here, we see that, like the defendant in ***Liebnitz***, Braxton responded affirmatively that he understood the repeater allegations, and by pleading no contest to them, agreed that he would not contest them. As the supreme court did in ***Liebnitz***, we conclude that based upon the totality of the record, Braxton's plea to the complaint constituted an admission for the purpose of WIS. STAT. § 973.12.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).